

OAL CHECKLIST EMERGENCY APA RULEMAKING

OAL File No. _____ - _____ - _____ E

Agency: _____

Reviewer: _____

Due Date: _____

(All citations are to the Government Code, unless otherwise specified. CCR means California Code of Regulations.)

REQUIREMENT

PROBLEMS

Has this emergency been posted on the OAL website? (11349.6(b))	Y	N	
Was the emergency posted on the OAL website the same day it was submitted to OAL?	Y	N	
1. FORM 400 (1 CCR 6)			
Is the name of the rulemaking agency in AGENCY WITH RULEMAKING AUTHORITY box? (1 CCR 6(b)(10))	Y	N	
Is the subject described in SUBJECT OF REGULATION(S) box? (1 CCR 6(b)(1))	Y	N	
Are all SECTIONS AFFECTED and TITLES listed? (1 CCR 6(b)(2))	Y	N	
Is the TYPE OF FILING correctly indicated as “Emergency,” “Resubmittal of Disapproved or Withdrawn Emergency” or “Emergency Readopt”? (1 CCR 6(b)(3))	Y	N	
READOPTION OF EMERGENCY FILING ONLY:			
Did the agency send five working day emergency notice required by 11346.1(a)(2)? (1 CCR 52) See also #3: <i>Notice of Proposed Emergency Action.</i>	Y	NA	N
Is the emergency regulation text the same or substantially equivalent to an emergency regulation previously adopted by the agency promulgating this action? (11346.1(h))	Y	NA	N
Has the agency made substantial progress and proceeded with diligence to comply with 11346.1(e)? (11346.1(h))	Y	NA	N
Has the agency incorporated by reference applicable portions of the previously approved emergency file? (1 CCR 52(c))	Y	NA	N
<i>If “yes,” is the previous file sufficiently identified by OAL file number? (1 CCR 6(b)(9))</i>	Y	NA	N
<i>(Note: If the file includes a Certification of Operational Necessity from the Department of Corrections and Rehabilitation, then see Penal Code 5058.3 for requirements different than those below. Initial effective period is only 160 days, not 180.)</i>			

<p>Only two readoptions are permitted (11346.1(h)). Readoptions should be received by OAL at least ten days prior to the Certificate of Compliance due date to allow time for OAL review.</p> <p>For first emergency readoption, repeal or amendment: --Was it submitted to OAL within 170 days of the effective date of the initially adopted emergency? (11346.1(e)) OR --Is there a special statute for more or less time?</p> <p>For second emergency readoption, repeal or amendment: --Was it submitted to OAL within 80 days of the effective date of the first readoption of the emergency? (11346.1(e))</p> <p>If “no,” for either readoption, notify agency regarding short-term reversion by operation of law to regulation as it existed prior to adopted emergency if approved after date Certificate of Compliance was due. (11346.1(e)-(g))</p> <p>Note: It may be necessary to prepare a “<i>Notice of Deletion or Reprinting Following Expiration of Emergency Regulatory Action</i>” so that the regulation as it existed prior to the emergency adoption, amendment, or repeal thereupon becomes effective. (11346.1(e)-(g))</p>	<p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p>
<p>Is the EFFECTIVE DATE designated as “<i>Effective on filing with Secretary of State</i>”? (1 CCR 6(b)(5); 11346.1(d)) OR Is a later date specified by state agency in writing?(11346.1(d))</p>	<p>Y NA N</p> <p>Y NA N</p>
<p>ONLY WHEN NOTICE TO, REVIEW, CONSULTATION, APPROVAL, OR CONCURRENCE BY ANOTHER AGENCY IS REQUIRED BY STATUTE: (1 CCR 6 (b)(6)) Is the designated agency indicated in B.6.?</p>	<p>Y NA N</p>
<p>Is the name of the agency CONTACT PERSON and TELEPHONE NUMBER included? (1 CCR 6(b)(7))</p>	<p>Y N</p>
<p>Does it include the SIGNATURE OF AGENCY HEAD OR DESIGNEE? Note: Designee must be listed in a signed delegation order in rulemaking file or on file with OAL. (1 CCR 6(b)(8)) Is it dated? (1 CCR 6(b)(8)(D)) Is the name and title typed? (11343(f); 1 CCR 6(b)(8)(E))</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>2. EMERGENCY REGULATION TEXT</p>	
<p>Is the emergency regulation text attached to the original and six copies of the Form 400? (11343; 1 CCR 6(a))</p>	<p>Y N</p>
<p>INCORPORATION BY REFERENCE Are any document(s) or form(s) mentioned in the regulations that have a regulatory effect? --If “no,” go to next block below “Regulation Text.”</p>	<p>Y N</p>

<p>--If “yes,” is the agency incorporating them by reference?</p> <p><i>If “no,”</i> are all regulatory provisions in the document or form either in existing regulations or in the proposed regulation to be printed in the CCR?</p> <p><i>If “yes,”</i> are the document(s) or form(s) attached to the original Form 400 for filing with the Secretary of State? Note: Six duplicate copies of document incorporated by reference not required for formal publication reasonably available from commonly known or identified source (1 CCR 20(d)).</p> <ul style="list-style-type: none"> • Is the title of the document or form clearly set out in the text? (1 CCR 20(c)(4)) • Is there a statement in the text that specifically identifies which portions of document/form are incorporated? (1 CCR 20(c)(5)) • <i>If document(s) or form(s) that are incorporated are being amended,</i> are the changes clearly indicated by underline/strikeout? • Is there a statement in the proposed text that includes the revision date (or other specific identifier) of the particular version incorporated? Exception: <i>No date required if authorizing statute requires adoption/enforcement of incorporated provision and any subsequent amendments. (1 CCR 20(c)(4))</i> 	<p>Y NA N</p>
<p>REGULATION TEXT</p> <p>Do(es) the regulation section number(s) fit into CCR?</p> <p>Are Authority and Reference citations included with the final text? (11346.2(a)(2); (1 CCR 8(a)(1))</p> <p>Does the underlying text (and Authority and Reference cites) match what is printed in CCR? (11344)</p> <p>Does the final text show changes to the CCR in underline/italic and strikeout format for additions and deletions; if adoption of new final text, then clearly indicated that all is to be added to CCR? (1 CCR 8(b))</p> <p>NOTE: <i>For readoption filings, if there were no changes since the initial adoption, the final text will not include any underline/strikeout.</i></p> <p>Is the final text a Building Standard? <i>Definition for Building Standard and exceptions are in Health & Safety Code 18909(a)-(j).</i></p>	<p>Y NA N</p>

<p><i>--If “yes,”</i> --Has the Building Standards Commission been contacted? (11346.1(c); Health & Safety Code 18942.1)</p> <p><i>--Has the final text been approved and filed pursuant to Health & Safety Code 18937 and 18938? (11346.1(c))</i></p>	<p>Y NA N</p> <p>Y NA N</p>
<p>3. CONFIRMATION OF NOTICE OF PROPOSED EMERGENCY ACTION OR NON-DELAY STATEMENT</p>	
<p><i>If this is a California Department of Corrections and Rehabilitation (CDCR) file, and includes a Certification of Operational Necessity, notice and showing of emergency are not required. (Penal Code 5058.3(a)(4)) Skip to block “Relied on Documents” in part 4: Finding of Emergency (bottom of page 5).</i></p>	
<p>Does the emergency situation clearly pose such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest? (11346.1(a)(3))</p> <p><i>--If “yes,” then has the agency included a statement confirming that the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest? (1 CCR 50(a)(5)(B))</i></p> <p><i>--If “yes,” then does the statement include:</i></p> <p><i>--Specific facts (substantial evidence) that allowing for notice and comment will likely result in serious harm?</i></p> <p><i>--Specific facts (substantial evidence) that immediate action is reasonably expected to prevent or significantly alleviate that serious harm?</i></p> <p><i>--If the 1 CCR 50(a)(5)(B) statement is provided, no emergency notice or public comment period is required. (11346.1(a)(3)) Skip to part 4: Finding of Emergency.</i></p> <p><i>--If “no,” then has the agency included a statement confirming that the agency complied with the requirements to provide five working day notice? (11346.1(a)(2)) (1 CCR 50(a)(5)(A))</i></p> <p><i>--Is there evidence in the file that notice of the proposed emergency action was sent five working days prior to submitting the action to OAL? (11346.1(a)(2))</i></p>	<p>Y N</p> <p>Y NA N</p>
<p><i>If Emergency is from Commissioner of Insurance:</i> Did the Commissioner comply with the notice requirements of Insurance Code 12921.7?</p>	<p>Y NA N</p>
<p>4. FINDING OF EMERGENCY</p>	
<p>SECTION 48 STATEMENT (1 CCR 48) Does the Finding of Emergency or other part of the provided notice include the statement required in 1 CCR 48?</p>	<p>Y NA N</p>

<p>SHOWING/STATEMENT OF EMERGENCY <i>NOTE: If this is a readoption, the agency may incorporate by reference applicable portions of the previously approved emergency file to fulfill the requirements of this part and parts 5 and 6 below. (1 CCR 52(c))</i></p> <p>Is the regulation a DEEMED EMERGENCY pursuant to statute? <i>Note: An urgency statute does not, in and of itself, constitute a deemed emergency or the need for immediate action. (11346.1(b))</i></p> <p style="padding-left: 40px;"><i>--If "yes," go to next block below "Relied on Documents."</i></p> <p>OR</p> <p>Does the file include an EXPRESS STATEMENT OF EXISTENCE OF EMERGENCY showing that the emergency regulation or order of repeal is necessary to address an emergency (a situation that calls for immediate action to avoid serious harm to the public peace, health and safety, or general welfare)? (11346.1(b)(1) and (11342.545))</p> <p style="padding-left: 40px;"><i>--If "yes,"</i> --Does the statement include specific facts demonstrating a situation that calls for immediate action to avoid serious harm to the public peace, health and safety, or general welfare? (11346.1(b)(2))</p> <p style="padding-left: 40px;"><i>--Does the statement demonstrate, by substantial evidence, the need for each provision to address the emergency? (11346.1(b)(2))</i></p> <p>Is the statement based only upon expediency, convenience, best interest, general public need or speculation?</p> <p style="padding-left: 40px;"><i>--If "yes," the statement is not adequate to demonstrate an emergency. (11346.1(b)(2))</i></p> <p>Was the situation identified in the statement known to exist by the agency in sufficient time to have addressed it through nonemergency regulations?</p> <p style="padding-left: 40px;"><i>--If "yes," does the statement include specific facts explaining the failure to address the situation through nonemergency regulations? (11346.1(b)(2))</i></p> <p><i>NOTE: Several appellate decisions regarding emergency regulations are listed at the end of the checklist.</i></p>	<p>Y NA N</p>
<p>RELIED ON DOCUMENTS Does the Finding of Emergency identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies? (11346.1(b)(2))</p>	<p>Y NA N</p>

AUTHORITY AND REFERENCE: Are citations included? (11346.1(b); 11346.5(a)(2))	Y	N
INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW (11346.5(a)(3)): Is it included in the rulemaking file?	Y	N
Is it in plain English?	Y	N
Is the format similar to Legislative Counsel digest? (11346.5(a)(3))	Y	N
Does it include a clear and concise summary of existing laws and regulations, <i>if any</i> , related directly to the proposed rulemaking and its effect? (11346.5(a)(3)(A))	Y	NA N
Does the policy statement overview explain broad and, if appropriate, specific objectives? (11346.5(a)(3)(C))	Y	N
--Does it include a description of specific benefits anticipated, including to the extent applicable nonmonetary benefits (11346.5(a)(3)(C))?	Y	NA N
--Does it include an evaluation of whether the proposed regulation is inconsistent/incompatible with existing regulations (11346.5(a)(3)(D))?	Y	NA N
<i>If there is a substantial difference from existing, comparable federal regulation or statute</i> , are significant differences briefly described? (11346.5(a)(3)(B))	Y	NA N
-- <i>If “yes,”</i> is a full citation to federal regulation or statute included? (11346.5(a)(3)(B))	Y	NA N
<i>If document(s) or form(s) are incorporated by reference</i> , are they listed by title and date? (1 CCR 20(c)(3))	Y	NA N
OTHER STATUTORY REQUIREMENTS: Are there any requirements identified in the file that are specific to the agency or type of regulation? (11346.1(b); 11346.5(a)(4))	Y	N
LOCAL MANDATE (11346.5(a)(5)): Is determination (policy or expenditure) included as to whether a mandate is imposed on local agency or school district that requires reimbursement pursuant to 17500 et seq.?	Y	N
--Is a mandate imposed?	Y	N
-- <i>If “yes,”</i> is reimbursement required pursuant to 17500 et seq.? (11346.5(a)(5))	Y	NA N
NOTE: <i>If regulation results in reimbursable cost to local agency/school district, OAL must disapprove unless information specified in 11349.1(d)(3) on source of funds is included in rulemaking file. See part 6: Form 399 (Fiscal Impact) to review supporting information for making this decision.</i>		

<p>FISCAL IMPACT (11346.5(a)(6); 11346.1(b)(2)): The following estimates must be prepared in accordance with DOF instruction (SAM 6601-6616):</p> <p>-- Is there any cost to any local agency or school district requiring reimbursement pursuant to 17500 et seq.?</p> <p>-- Is there any cost or savings to any state agency?</p> <p>-- Is there any other non-discretionary cost or savings imposed upon local agencies?</p> <p>-- Is there any costs or savings in federal funding to the state?</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>5. OTHER INFORMATION (<i>if applicable</i>)</p>	
<p><i>If Emergency is from Department of Corrections and Rehabilitation (CDCR)</i>, is this a Certification of Operational Necessity Emergency? (Penal Code 5058.3 (a)(2) and (a)(3)) <i>NOTE: This is an alternative to filing a statement of emergency. It allows for the initial adoption and only one readoption. (Penal Code 5058.3(a)(2)) The public comment period is 10 calendar days and the OAL review period is 20 calendar days. It does not preclude filing a Finding/Statement of Emergency pursuant to the APA. (Penal Code 5058.3(a)(3))</i></p> <p>-- <i>If “yes:”</i></p> <p>--Is a written Certification by the Secretary included? (Penal Code 5058.3 (a)(2))</p> <p>--Does the statement include a description of underlying facts with an explanation of operational necessity for emergency? (Penal Code 5058.3 (a)(2))</p> <p><i>NOTE: The "initial effective period" for all CDCR emergency regulations is 160 days. (Penal Code sec. 5058.3(a)(1)) The re-adoption effective period is 90 days. A second readoption is permissible, but it must be submitted in compliance with 11346.1 requirements. (11346.1(h))</i></p>	<p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p>
<p><i>If Emergency is from Fish and Game Commission:</i> (Fish & Game Code 240)</p> <p>Was a public hearing held?</p> <p>Was one of the following findings made?</p> <ul style="list-style-type: none"> • Necessary for the immediate preservation of the public peace, health and safety, or general welfare. • Necessary for the immediate conservation, preservation, or protection of birds, mammals, reptiles, or fish, including, but not limited to, any nests or eggs thereof. 	<p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p>
<p>6. APPROVAL BY BOARD/COMMISSION/PANEL/ETC.</p>	
<p>If adopted by a board/commission/panel or similar rulemaking entity, does the record indicate that this entity approved the regulatory text? (11343(a))</p>	<p>Y NA N</p>

7. FORM 399 – FISCAL IMPACT

Is the Fiscal Impact portion of the STD 399 included in the rulemaking file? (11346.5(a)(6))	Y	N
Is the Fiscal Impact portion of the STD 399 completed and signed by the Agency Secretary or, if rulemaking agency is not under an Agency Secretary, by the highest ranking official in agency? (SAM 6614) <i>NOTE: No DOF concurrence required for emergency regulations. (Per instruction from DOF, SAM 6614, March 2009)</i>	Y	N

8. PUBLIC COMMENTS

Does the emergency situation clearly pose such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest? (11346.1(a)(3)) --If “yes,” then OAL’s five calendar day comment period required by 11349.6(b) is not required. --If “no,” then OAL must allow comments submitted during five calendar days after posting of notice on OAL website (11349.6(b)). Action by OAL cannot be taken until after this comment period.	Y	NA	N
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OAL ACCEPTANCE OF COMMENTS

Have <u>all</u> of the following conditions been met: --Comment submitted in writing? (1 CCR 55(b)(1))	Y	NA	N
--Comment received by OAL within five calendar days after the regulation has been submitted to OAL and posted on the OAL website? (1 CCR 55(b)(2))	Y	NA	N
--Notation submitted with comments (1 CCR 55(b)(3)): --Indicating comment is submitted to OAL for consideration in connection with an emergency regulation review?	Y	NA	N
AND --Identifying topic of emergency regulation to which comment relates?	Y	NA	N
--A copy of the comments have been transmitted to the rulemaking agency’s contact person for the emergency rulemaking filing, as designated on the Form 400? (1 CCR 55(b)(4))	Y	NA	N

Agency opportunity to respond:

Was the rulemaking agency contacted within one working day after the receipt of an acceptable comment to confirm that the comment is being considered by OAL? (1 CCR 55(f))	Y	NA	N
Was the agency advised that it has the opportunity to rebut or otherwise respond to the comment(s)? (1 CCR 55(f))	Y	NA	N
<i>If OAL considered any information not submitted by the rulemaking agency when determining whether to file an emergency regulation, was the agency provided an opportunity to rebut or comment? (11349.6(c))</i>	Y	NA	N

Agency response acceptable for consideration (1 CCR 55(g)): Is the response in writing?	Y	NA	N
Was the response received by OAL within eight calendar days after receipt of the emergency filing?	Y	NA	N
<i>--If 8th day is a Saturday</i> , was response received by Friday? (1 CCR 55(g))	Y	NA	N
<i>--If state holiday(s) between 5th and 8th day after receipt of the filing</i> , was response received by 9th day?	Y	NA	N
<i>--If 9th day is Saturday, Sunday, or state holiday</i> , was response received by 10 A.M. on last review day? (1 CCR 55(f) and (g); 11349.6(b))	Y	NA	N
9. SUBSTANTIVE REQUIREMENTS			
AUTHORITY (11349(b); 11342.1; 11342.2; 1 CCR 14): Are citations specific, accurate and complete?	Y		N
Is there express or implied statutory or constitutional authority to adopt, amend or repeal the proposed regulation?	Y		N
Does the regulation alter, amend, or enlarge a statute? (1 CCR 14(c)(1)(A))	Y		N
Are there any considered public comments challenging the agency's "authority"? (1 CCR 14(c)(1)(B))	Y		N
Does a statute provide specific authority to impose fine or imprisonment, or both? (11145)	Y	NA	N
If intended to promote fire and panic safety or provide fire protection and prevention, including fire suppression systems, equipment or alarms , has it been approved by State Fire Marshal? (11359(a))	Y	NA	N
<i>--If "no,"</i> is regulation expressly required to be at least as effective as federal standards pursuant to 11359(b)?	Y	NA	N
REFERENCE (11349(e); 1 CCR 14(b)): Are citations specific, accurate and complete?	Y		N
CONSISTENCY (11342.2, 11349(d)): Is the regulation consistent with statutes enforced or administered by the submitting agency?	Y		N
Do the regulations conflict with the Public Records Act? (Government Code 6250-6270)	Y	NA	N
Do the regulations conflict with the Information Practices Act? (Civil Code 1798)	Y	NA	N
Are the regulations consistent with other applicable statutes or regulations?	Y	NA	N

<p>CLARITY (11349(c); 1 CCR 16):</p> <p>Does the regulation use language correctly, including spelling, grammar and punctuation?</p> <p>Does the regulation use citation styles that clearly identify published material?</p> <p>Does the regulation present information that is readily understandable by those directly affected?</p> <p>Can the regulation on its face be reasonably and logically interpreted to have more than one meaning?</p> <p>Does the language of the regulation conflict with the agency's description of the effect of the regulation?</p> <p>Does the regulation use terms that do not have meaning generally familiar to those directly affected (and the terms aren't defined in the regulation or governing statute)?</p>	<p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p> <p>Y N</p>
<p>NONDUPLICATION (11349(f); 11346.2(b)(5); 1 CCR 12):</p> <p>Does the regulation repeat or rephrase in whole or in part a state or federal statute or regulation?</p> <p><i>--If "yes," do any of these exceptions apply:</i></p> <p>EXCEPTIONS (1 CCR 12 (b))</p> <p>(1) Necessary to satisfy clarity standard <i>--Is justification as specified in 1 CCR 12 (b)(1) included?</i></p> <p>(2) Federally mandated regulation (1 CCR 12 (b)(2)) <i>--Does agency meet requirements of 11346.9(c)?</i></p> <p>(3) Mandated or authorized by provision of law <i>--Statement identifying duplicated or overlapped statute or regulation and provision of law in citation style which permits or mandates duplication or overlap is included?</i> (1 CCR 12 (b)(3)(A) and (B))</p>	<p>Y N</p> <p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p> <p>Y NA N</p>
<p>NECESSITY (11349(a); 11346.1(b)(2); 1 CCR 10):</p> <p>Does the description of facts demonstrate by <i>substantial evidence</i> the <i>need</i> for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency?</p>	<p>Y N</p>

Identified, published appellate decisions regarding emergency regulations:

- *California Association of Nursing Homes v. Williams* (1970) 4 Cal.App3d 800, 84 Cal.Rptr. 590, 85 Cal.Rptr. 735
- *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 98 Cal.Rptr. 609.
- *California Medical Association v. Brian* (1973) 30 Cal.App.3d 637, 106 Cal.Rptr. 555
- *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596 (crisis situation, emergent or actual—seriously affect public peace, health and safety or general welfare)
- *Carmen Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187 (unforeseen situation calling for immediate action)